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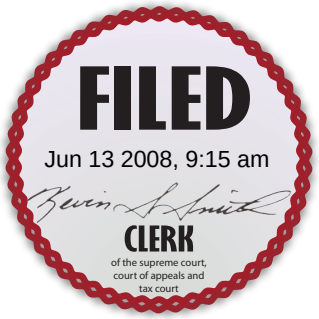

APPELLANT PRO SE:

DOUGLAS W. TURNER
Brooklyn, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DOUGLAS W. TURNER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 55A05-0712-CV-690
	)	
BRYAN DOUGLAS MCCORMICK,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
The Honorable Robert E. Lybrook, Magistrate
Cause No. 55D03-0703-SC-433

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Douglas Turner, pro se, appeals the trial court's judgment in favor of Bryan D. McCormick. Turner purports to raise three issues for our review, but we address only the following issue: whether the trial court erred in entering judgment on Turner's claim in favor of McCormick.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the fall of 2007, Turner sued McCormick. At trial, the following exchange took place between Turner and the trial court, establishing the factual basis of Turner's suit:

> Q [by the court:] Now you've hired Mr. McCormick as an appraiser?
>
> A [by Turner:] Yes, Your Honor.
>
> Q He appraised your property and testified in Court [during eminent domain proceedings]. Can you tell me why he owes you money?
>
> A The appraisals on the written [sic] are so stated on the front page "as is" values [sic]. One for residential [at $113,000] and one for commercial [at $126,000]. Both of them spell out the specifics in the latter pages of how they got to that particular value. In the transcript on the next to the last page Mr. McCormick's testimony was that he didn't know what the property was worth. He wouldn't state a value.
>
> Q We have one piece of property here or two?
>
> * * *
>
> A One property with two free[-]standing buildings.
>
> Q Okay. And you're saying that cost you money?
>
> A Yes, and that specific amount is attorney fees. The amount of money that was expended originally was eighteen[-]hundred dollars

for the appraisal on a two[-]thousand dollar bill and the appraisal of the properties done by the two appraisers of the Town of Mooresville stated thirty[-]nine thousand ($39,000.00) and if thirty-nine thousand ($39,000.00) was its real value then I would accepted [sic] the thirty-nine thousand ($39,000.00) without going to Court for a couple of years. Later[,] after the judgment was rendered by the Court as to its value at thirty-nine thousand[,] I had the properties appraised by three different appraisers . . . and all three of them came up with a value of thirty-nine thousand. So I feel like I've been done unjustly in the respect that eighteen[-]hundred dollars ($1,800) is a lot of money just to appraise the city lot.

Q So you're asking damages in the amount of eighteen[-]hundred dollars ($1,800)?

A No, six[-]thousand dollars ($6,000), the amount of the attorney fees.

* * *

Q Okay. So, you're saying that basically Mr. McCormick made you think your property was [worth] a lot of money by his appraisals and you're saying because of that you hired a lawyer and spent money on your lawyer [during the eminent domain proceedings] . . . ?

* * *

A Yes.

Q So I understand what you're saying at least. Anything else you want to tell me?

A No . . . .

Transcript at 9-10, 13-14.

Following its examination of Turner, the court asked questions of McCormick:

Q And did you appraise property for Mr. Turner?

A Yes, I did, Your Honor.

Q And I have Exhibits 1 and 2, are those your appraisals?

A Yes sir.

Q And did you go to Court later and tell them [sic] that you didn't know how much the property was worth then? I think that's what [Turner's] saying[.]

A No, no sir, I did not do that.

Q Okay, can you tell me from your side of the story what happened?

A Yes sir. . . . I want to say first that Mr. Turner has got [sic] his cart before the horse in terms of what he did. Because on the 2nd of March there was a determination of damages . . . .

* * *

A And basically on the 2nd of March in '04 there was a determination of damages award setting the damage for the taking of Mr. Turner's property at 39 West Main at thirty[-]nine thousand dollars ($39,000.00). Uh, now at this time I was not in the picture. Remonstrates were to be heard on 04 06 [sic] and what happened, I have no idea. . . . Mr. Turner filed a remonstrance that the price was too low and that he wanted an order to repair for the rooming house . . . .

* * *

A He stated that . . . he didn't form his opinion until after he hired me for an appraisal and had he known . . . that the appraisal was thirty[-]nine thousand dollars he would have accepted that price and he would not have hired an attorney. Well, I have here on April 19th, which was before he came to my office, a, filed [sic] with the Clerk-Treasurer his remonstrance which he states number one, the price is too low. So he'd already made up his mind the price was too low[;] didn't have anything to do with me. And secondly, he . . . states that he suggests an order for repair of the rooming house and he would start in May and, in other words, he didn't want to give the property up, he wanted to keep the property and fix it up and continue to make income from it . . . .

* * *

A On the 26th of . . . March, Mr. Turner came into my office . . . and asked me to do an appraisal with the assumption that the property is in the condition of no deferred maintenance and is suffering only minimal physical depreciation as would be typical of an improvement its age and use under competent management. . . .

[H]is strategy in the [eminent domain proceeding] was, was he'd like to have kept the property and, and, because it was more valuable to him than the thirty[-]nine thousand dollars if he could fix it up and use it to generate income as it did prior to that when it was a boarding house, rooming house. And the city, I think[,] had different ideas about that. Nevertheless, he asked me to appraise it for that value so as what it would have been had it not, had he been allowed to repair it and had it been, you know, . . . in the same condition as other similar[-]type properties in Mooresville . . . .

THE COURT: I see on your appraisal on page two of one of them that it says extraordinary assumption of the subject is no differed, is that deferred, should be deferred[. . .]

A Yes sir.

THE COURT: [. . .]maintenance and is only suffering minimal physical depreciation as would[,] I suppose[,] be typical of an improvement, its age and use under competent management. Hypothetical conditions are that it is at least as a commercial retail use with a landlord tenant paying all expenses including tenant improvements. Cost approach is not used in this complete appraisal and does not invoke . . .

A Does not invoke departure cost.

* * *

Q [by the Court:] And your other appraisal . . . has that same language on it?

A Yes sir.

Id. at 14-19.

Finally, during McCormick's cross-examination, he and Turner engaged in the following exchange:

Q [by Turner:] What was the purpose of . . . or the meaning of the term "as is" you put on the front page [of the appraisals]?

* * *

A [E]stimated market value "as is." Uh, in [t]hat section there . . . is . . . a comment right below it which says extraordinary assumptions[,] hypothetical conditions and limiting conditions and it states that the . . . extraordinary assumptions are that the subject has no deferred maintenance and is only suffering minimal physical depreciation as would be typical of an improvement its age and use under competent management and that's what "as is" means. That's the answer to your question. "As is" means it is under the hypothetical assumption that it is in livable, rental able [sic] condition.

Q So you think "as is" means anything that you might determine later?

A I didn't say that. I said "as is" means exactly what a hypothetical condition is that it's under as I was instructed to do, Your Honor, by assuming it was repaired and rental able [sic]. And repaired and rental able [sic] in two circumstances, one as a residence and one as a commercial [sic] so it actually [sic] two different appraisals.

Id. at 30-31. After the bench trial, the court generally denied Turner's request for relief and entered judgment in favor of McCormick. This appeal ensued.

DISCUSSION AND DECISION

Turner argues that McCormick's "as is" appraisal values of the property—$113,000 and $126,000—were negligent misrepresentations[1] by McCormick. See Appellant's App. at *5-6.[2] McCormick has not filed an appellee's brief; accordingly, we do not undertake the burden of developing arguments on his behalf and we may reverse the trial court if Turner establishes prima facie error. See, e.g., In re M.M.B., 877 N.E.2d 1239, 1242 (Ind. Ct. App. 2007). "Prima facie" is defined as "at first sight, on

[1] In his brief, Turner interchangeably refers to McCormick's conduct as a misrepresentation and as a breach of contract. Those are two separate causes of action. At the trial level, Turner asserted that McCormick had committed a "Tort or Negligence," which applies only to a claim of misrepresentation. See Transcript at 3. And the substance of Turner's appeal is based on McCormick's purported representations in the appraisals, which are not, in themselves, clearly contracts. Accordingly, we consider Turner's claim against McCormick to be one based only on misrepresentation.

[2] The Appellant's Appendix is not paginated.

first appearance, or on the face of it." Id. (quoting Railing v. Hawkins, 746 N.E.2d 980, 982 (Ind. Ct. App. 2001)). However, we also note that the trial court entered a general judgment against Turner's claims. "In the absence of special findings, we review a trial court decision as a general judgment and, without reweighing evidence or considering witness credibility, affirm if sustainable upon any theory consistent with the evidence." Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008) (quoting Perdue Farms, Inc. v. Pryor, 683 N.E.2d 239, 240 (Ind. 1997)).

Turner asserts that McCormick appraised Turner's residential and commercial property at values in excess of $100,000 each. In reliance on those appraised values, Turner continues, he incurred attorney's fees in excess of $6,000 by arguing against the Town of Mooresville's offered value of $39,000 for that property in an eminent domain action. However, Turner next asserts, had he known that McCormick's appraisals were based on stipulated hypotheticals, and not the value of the property in its actual condition, Turner would not have hired those attorneys to litigate the value of his property during the eminent domain proceeding. Accordingly, Turner concludes, he was damaged by McCormick's representations by the amount of money Turner spent on attorneys in the eminent domain proceedings. We cannot agree.

To prevail on a claim of negligence a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach. Florio v. Tilley, 875 N.E.2d 253, 255 (Ind. Ct. App. 2007) (citing Ford Motor Co. v. Rushford, 868 N.E.2d 806, 810 (Ind. 2007)). And regarding negligent misrepresentation in particular, this court has recognized that:

> One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting[.]

Gibson v. Evansville Vanderburgh Bldg. Comm'n, 725 N.E.2d 949, 954 n.5 (Ind. Ct. App. 2000) (quoting and adopting United States v. Neustadt, 366 U.S. 696, 707 (1961) (quoting RESTATEMENT OF TORTS (1938) § 552)) (alteration in original), trans. denied.

Here, there is evidence supporting the trial court's judgment. McCormick testified that the values at which he appraised Turner's property were qualified by hypothetical conditions not actually in place. The appraisals themselves clearly note those qualifications to McCormick's stated "as is" values. And, at trial, McCormick further testified that Turner had specifically requested McCormick to consider those hypothetical conditions. Thus, Turner cannot demonstrate that McCormick "fail[ed] to exercise . . . care and competence in obtaining and communicating the information" contained in the appraisals. See id. As such, the trial court's judgment is sustainable upon a theory consistent with the evidence, and we must affirm. See Baxendale, 878 N.E.2d at 1257.

Affirmed.

DARDEN, J., and BROWN, J., concur.